UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

UPMC and its Subsidiary, UPMC Presbyterian Shadyside, Single Employer, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital and SEIU Healthcare Pennsylvania, CTW, CLC	Cases 06-CA-102465, 06-CA-102494, 06-CA-102516, 06-CA-102518, 06-CA-102525, 06-CA-102534, 06-CA-102540, 06-CA-102542, 06-CA-102544, 06-CA-102555, 06-CA-102559, 06-CA-102566, 06-CA-104090, 06-CA-104104, 06-CA-106636, 06-CA-107127, 06-CA-107431, 06-CA-107532, 06-CA-108547, 06-CA-111578, 06-CA-115826

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CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ'S SUPPLEMENTAL DECISION OF JULY 31, 2015

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CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO ALJ'S SUPPLEMENTAL DECISION OF JULY 31, 2015

I. INTRODUCTION

This brief is submitted in support of the Exceptions of the Charging Party, SEIU Healthcare Pennsylvania ("Union") to the Supplemental Decision of Administrative Law Judge (ALJ) Mark Carissimi issued on July 31, 2015. Charging Party also joins in the arguments made by the General Counsel in Support of his Exceptions.

The ALJ erred when he dismissed the single employer allegations because "under the circumstances, it would not effectuate the policies of the Act to continue to litigate and reach a decision regarding that allegation," and ordered UPMC to "be the guarantor of any remedies that the Board may order" against Respondent Presbyterian Shadyside. ALJD at 8-9. We except here because: (1) the dismissal of the single employer allegations was contrary to the Board's order of February 7, 2014, denying UPMC's Motion to Dismiss Amendments which raised virtually identical arguments seeking the dismissal of the same allegations; and (2) the ALJ erred in holding that UPMC's "guarantee" of any Board-ordered remedy against Respondent Presbyterian Shadyside ("Presbyterian") was "as effective a remedy" as finding that the Respondents were a single integrated employer, jointly and severally liable for each other's conduct.

II. STATEMENT OF FACTS/RELEVANT PROCEDURAL HISTORY

Respondents UPMC and Presbyterian (along with other UPMC subsidiaries) have been named in three complaints since 2012.[1] In each complaint, the General Counsel alleged that

[1] A total of three complaints have been issued against UPMC and Presbyterian Shadyside. Case No. 06-CA-081896 ("UPMC I"); Case No. 06-CA-102465 ("UPMC II"); and Case No.06-CA-119480 et al. ("UPMC III"). In addition, other UPMC entities have been named in *UPMC I* (Magee Women's Hospital) and *UPMC III* (Magee Women's Hospital, Mercy Hospital and University of Pittsburgh Physicians).

UPMC and its subsidiaries were a single integrated employer. Among other relevant factors, UPMC has comprehensive and ultimate authority over Presbyterian; it admitted in a stipulation in *UPMC I* that it retains the right to withdraw "delegated authority" from Presbyterian.[2]

A. UPMC I -- Case No. 06-CA-081896

In *UPMC I*, the Region alleged dozens of ULPs for intimidation and harassment, unlawful disciplines (including two discharges), surveillance, and the enforcement of unlawful policies against "solicitation." The Complaint in *UPMC I* named UPMC as a single employer with subsidiaries Presbyterian Shadyside and Magee Women's Hospital, fully liable on a joint and several basis, not just for facially unlawful system-wide policies, but for all of the unlawful conduct alleged, regardless of the facility where the violations occurred. Significantly, the Board denied UPMC's pre-trial summary judgment motion seeking dismissal of the single employer allegations from the litigation in *UPMC I*.[3]

On February 7, 2013, the parties entered into settlement agreements with default provisions, requiring the reinstatement of two discharged workers (Ron Oakes and Frank Lavelle), prohibiting Respondents from unlawfully threatening employees with discharge or discipline for supporting the Union, and from discriminatory enforcement of policies against union supporters. UPMC and Presbyterian also entered into a remedial stipulation where they

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[2] See ¶5 of the stipulation UPMC entered into in *UPMC I* (marked as Joint Exhibit 2 in those proceedings) which states: "UPMC has delegated most of its policy-making functions to certain officials of Respondent Presbyterian Shadyside." A copy of this exhibit was attached as Exhibit A to the Charging Party's Opposition to Respondent's Partial Motion to Dismiss and is part of the record here as the ALJ "ordered the record reopened for the limited purpose of receiving the briefs and attachments of the parties." Supp. ALJD at 2.

[3] *See* the Board's Order dated January 28, 2013("Respondent [UPMC] has failed to establish that there are no genuine issues of fact and that it is entitled to judgment as a matter of law").

agreed to rescind any unlawful policies "wherever they exist on a system wide basis at any and all of Respondent's facilities."[4]

The *UPMC I* case then proceeded to hearing on the General Counsel's second amended complaint concerning a challenge to the lawfulness of Respondent's email and solicitation policies. Notwithstanding the absence of any allegation of direct wrongdoing by UPMC, ALJ Goldman refused to dismiss UPMC from the proceedings, finding it to be a necessary party for relief. On April 19, 2013, ALJ Goldman found that most of the Respondents' challenged policies violated §8(a)(1), except for the solicitation policy, which he found to be consistent with *Register Guard*.[5] The parties filed Exceptions, and on August 27, 2015, the Board affirmed the ALJ's Decision in part, agreeing that the email policies were unlawful, but reversed as to the solicitation policy, finding it also to be unlawful pursuant to the Board's intervening decision in *Purple Communications Inc.*[6] *UPMC I*, 362 NLRB No. 191 (August 27, 2015).

As the ink was drying on the *UPMC I* settlement agreements, Respondents immediately intensified their anti-Union campaign, targeting and retaliating against numerous employees who showed interest in the Union. The General Counsel has stated his intention to move for default judgment, based upon Respondents' breach and the default provisions of the *UPMC I* Settlement Agreements, once the Board has ruled on the merits of *UPMC II* (described below).

B. UPMC II -- Case No. 06-CA-102465 (Merits)

[4]UPMC entered into a pretrial stipulation to resolve single employer allegations, agreeing *inter alia*, that it would expunge any policies found to be unlawful on a system-wide basis at any all of its facilities. See *UPMC I*, Joint Exhibit 1. A copy of this exhibit was attached as Exhibit B to the Charging Party's Opposition to Respondent's Partial Motion to Dismiss and was cited in the Board's recent decision in *UPMC I*, 362 NLRB No. 191, slip. Op. at 1, n. 2 (August 27, 2015).

[5] *Register Guard*, 351 NLRB 1110 (2007).

[6] *Purple Communications Inc.*, 361 NLRB No. 126 (December 10, 2014)

The Region issued a complaint in the instant case, *UPMC II*, asserting about 45 new labor law violations (including a second discharge of Ron Oakes, the discharge of three other employees, the repeated discriminatory enforcement of its solicitation policy, and other ULPs ostensibly "resolved" in *UPMC I*). The complaint was amended to similarly name UPMC as a single employer with Presbyterian Shadyside. On January 27, 2014, UPMC filed a Motion to Dismiss Amendments, arguing that the Region had improperly amended the complaint to include allegations that it was a single employer.[7] On February 7, 2014, the Board denied the motion.

The General Counsel and the Union each issued subpoenas to UPMC and Presbyterian, seeking documents related to the single employer allegations. In response, UPMC and Presbyterian filed Petitions to Revoke. ALJ Carissimi denied the petitions in substantial part and ordered both Respondents to produce documents, but UPMC refused to comply.[8] Respondent's actions forced the General Counsel to initiate litigation in the U.S. District Court, which likewise ordered compliance with the subpoenas. UPMC appealed to the Third Circuit Court of Appeals, where oral argument has been set for October 7, 2015.[9]

In April 2014, the ALJ bifurcated the single employer issue from the merits so that "ongoing subpoena enforcement proceedings regarding the single employer issue [would not] delay resolution of the substantive unfair labor practice issues in the complaint." [Supp. ALJD at

[7] A copy of UPMC's 1/27/14 Motion to Dismiss Amendments was attached as Exhibit C to the Charging Party's Opposition to Respondent's Partial Motion to Dismiss.

[8] The ALJ granted in part, and denied in part, Respondents' Petitions to Revoke Subpoenas B-720565, B-720563 and B-720504, issued by the General Counsel and Union.

[9] On March 20, 2014, the General Counsel filed an application on behalf of the Board to enforce the Union's and General Counsel's three subpoenas in the U.S. District Court for the Western District of Pennsylvania in the consolidated case, *NLRB v. UPMC Presbyterian Shadyside*, Case no. 2:14-mc-00109-AJS *et seq*. Respondent opposed the enforcement of the subpoenas in district court. On August 22, 2014, the district court granted the Board's application to enforce all three subpoenas, amending its order on September 2, 2014, and stayed its orders pending appeal. A Motion for Reconsideration by Respondent was denied on October 27, 2014 and Respondent's appeal to the Third Circuit is pending, *NLRB v. UPMC Presbyterian Shadyside*, No. 14-4523.

2]. But for Respondent's refusal to obey the ALJ's order, the single employer allegations would have been tried in the same proceeding with the case on the merits in 2014.[10]

Following a 5-week long trial, ALJ Carissimi issued a Decision on November 14, 2014 in *UPMC II* (JD 62-14), finding merit to almost all of the ULPs charged. At trial, Presbyterian itself introduced evidence of UPMC's direct participation in its labor relations.[11] As described by ALJ Carissimi, Respondent engaged in a pattern of "extensive and serious unfair labor practices" to intimidate and coerce employees and "nip-in-the-bud" the Union's nascent organizing drive. [JD 62-14 at 115]. He recognized that Respondent's discharges of the Union's most prominent supporters, were "highly coercive." [*Id*. at 115]. He "rel[ied] particularly on the history of employer hostility to the union activities of its nonclinical support staff employees." JD 62-14 at 95. *See also, id* at 41 ("Respondent has demonstrated hostility to the Union's attempt to organize its employees"); *id*. at 64 ("I find that there is a history of employer hostility to the union and protected activity"); *id*. at 73 ("Respondent harbored animus toward the union activities of its non-clinical support staff…"). As a consequence, the ALJ issued a "broad order" and other special remedies, including notice reading. [JD 62-14 at 115]. All parties filed exceptions and the matter is now pending at the Board.

C. UPMC III -- Case No.06-CA-119480

[10] The ALJ's dismissal of the single employer allegations rewards UPMC for its defiance of the ALJ's (and the federal court's) orders to produce documents. Courts and the Board have recognized that such conduct should not be tolerated. *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944) (affirming that the Board acted within its statutory authority in ordering employer to bargain collectively with union even after it lost its majority status after employer had refused to bargain, and criticizing "procedural delays [which can] provid[e] employers a chance to profit from a stubborn refusal to abide by the law"). *See also, P.S.C. Resources, Inc.*, 231 N.L.R.B. 233, 235 (1977) ("It is obviously improper, for [the employer] to attempt to order and manipulate the timing and presentation of General Counsel's case [by delaying compliance with a subpoena]").

[11] For example, PHU/SHY Exhibits 299, 300 and 301 demonstrate that Robert DeMichiei, UPMC's Chief Financial Officer, heard and denied the appeal of the grievance of discriminatee Al Turner. PUH/SHY Exhibit 411 represents Respondent's effort to refute the discriminatory Performance Improvement Plan and discharge of Jim Staus by introducing comparator evidence from another UPMC subsidiary, Hamot Medical Center.

On July 31, 2014, the Region issued a third complaint against UPMC and its subsidiaries, Presbyterian, Magee Women's Hospital, Mercy Hospital and University of Pittsburgh Physicians as a single employer, asserting 13 violations of §8(a)(1) which were substantially similar to the conduct found unlawful in *UPMC II* (such as restrictions on the distribution of union literature, discriminatory enforcement of the solicitation policy and bulletin board access rules, discriminatory enforcement of the right to wear union insignia, unlawful restrictions upon the distribution of union literature, unlawful denial of public premises access for non-employees, and unlawful surveillance.) *UPMC III* was settled on April 10, 2015, over the Union's objections, on the basis that UPMC would "guarantee" the remedies agreed to by the four subsidiaries.[12] The allegations in *UPMC III* clearly demonstrate that Respondents were deterred by neither the prior settlement agreements nor the ALJ's numerous ULP findings.

D. UPMC II – Case No. 06-CA-102465 (Single Employer Allegations)

After the April 2014 bifurcation in *UPMC II*, the single employer allegations remained pending, awaiting a judicial ruling on the enforcement of the document subpoenas. In May 2015, the ALJ convened two telephonic conferences, soliciting the parties' interest in a settlement of the single employer allegations based on the "guarantee" mechanism in the *UPMC III* settlement. When the General Counsel and the Union rejected the idea based on the number, breadth and seriousness of the ULPs, the ALJ solicited UPMC to file a motion to dismiss on the grounds that litigating the single employer allegations would not effectuate the purposes of the Act in light of its "guarantee."

On June 4, 2015, UPMC filed a Partial Motion to Dismiss ("PMTD") the single employer allegations on the basis that it would "guarantee" any Board-ordered obligations of Presbyterian.

[12] The General Counsel exercised his discretion to accept a "guarantee" from UPMC under the limited circumstances in UPMC III, but has opposed such a resolution here based on the severity and breadth of the labor law violations found by the ALJ.

On July 31, 2015, the ALJ granted the motion, dismissing the single employer allegations and ordering UPMC to guarantee Presbyterians' obligations. He reasoned:

> Having duly considered the positions of the parties I have determined that it would not effectuate the policies of the Act to further litigate the issue and make a determination regarding whether UPMC and Presbyterian Shadyside constitute a single employer. I construe UPMC's willingness to serve as the guarantor of any remedy that ultimately may be issued by the Board in this case as consent that it undertake such action pursuant to a Board order.
>
> Accordingly, I have concluded that it is appropriate to dismiss the allegations in the complaint that UPMC and Presbyterian Shadyside constitute a single employer but, based on its asserted willingness to do so, order UPMC to ensure that Presbyterian Shadyside complies with any remedy that may be ordered by the Board in this case.

Supp. ALJD at 3-4.

QUESTIONS INVOLVED

1. Did the ALJ err as a matter of law in concluding that "changed circumstances" justified contravening the Board's February 7, 2014 order? [Union Exceptions #2, #5].

2. Did the ALJ err as a matter of law in finding that UPMC's offer to guarantee any Board-ordered remedy against Presbyterian is "as effective a remedy" as a finding that it is a single employer and thus subject to joint and several liability? [Union Exceptions # 1, #2, #3, #4, #6, #8]

3. Did the ALJ err as a matter of law in concluding that he could rule on UPMC's Partial Motion to Dismiss in the absence of any pertinent record evidence? [Union Exception #7].

ARGUMENT

I. The ALJ Erred as a Matter of Law in Concluding that "Changed Circumstances" Justified Contravening the Board's February 7, 2014 Order. [Union Exceptions #2, #5].

On January 27, 2014, prior to the opening of the hearing on the merits, UPMC filed a Motion to Dismiss Amendments, arguing that the Region had improperly amended the complaint in *UPMC II* to allege that it was a single employer with Presbyterian.[13] On February 7, 2014, the

[13] See Exhibit C attached to the Charging Party's Opposition to Respondent's Partial Motion to Dismiss.

Board denied the Motion to Dismiss Amendments, holding that "Respondents have failed to establish that the amendments are improper and that they are entitled to judgment as a matter of law."

Both the 2014 Motion to Dismiss Amendments and the instant PMTD sought the same result at the same procedural step -- dismissal of the single employer allegations before any single employer "facts" were received into evidence. UPMC also raised several points in the PMTD which were identical to the points it made in the earlier motion. For example, the PMTD asserted that UPMC should be dismissed as Respondent because "no party has questioned Presbyterian Shadyside's ability to satisfy any remedies ultimately ordered in this matter, nor is there any reason to question this ability." [PMTD at 5]. UPMC also asserted that, "No remedy is requested against this entity [UPMC], and the substantive allegations of the UPMC II Consolidated Complaint have been fully litigated without the participation of this entity as a party" and that "further processing of the UPMC II Consolidated Complaint against Respondent UPMC … would not serve any purposes of the Act." *Id.* at 6.

These arguments are virtually identical to the contentions made in the 2014 Motion to Dismiss Amendments which alleged, *inter alia*:

> 13. On the face of the Amended Consolidated Complaint, no substantive allegation implicates UPMC or necessitates UPMC's presence as a respondent.
>
> 14. On the face of the Amended Consolidated Complaint, no allegation is made that any alleged unfair labor practice is beyond the capability of UPMC Presbyterian Shadyside to fully remediate if a violation is found to have occurred.
>
> 16. On the face of the Amended Consolidated Complaint and the separate burdensome "single employer" subpoenas served on both UPMC and UPMC Presbyterian Shadyside, including UPMC as a respondent and litigating the single employer issue in this case will create undue demands in terms of time and expense and will waste the

> resources of all parties, as well as those of the Office of Administrative Law Judges, without furthering the purposes of the Act.

Exhibit C at ¶¶13, 14, 16.

The Board's February 2014 ruling specifically rejected the argument that the pre-trial dismissal of the single employer allegations would further the purposes of the Act. Consequently, this ruling was binding on the ALJ and represented the established law of the case. *Teamsters Local 75*, 349 N.L.R.B. 77, 80 (2007) . The ALJ had no authority to contravene the Board's prior decision on the same issue based upon the same rationale. *Morgan Services,* 339 NLRB 463 fn. 1 (2003) (adhering to law of the case established by prior Board order); *Technology Services Solutions*, 332 NLRB 1096, 1096 fn. 3 (2000) (recognizing that unpublished orders of the Board establish the law of the case in subsequent proceedings); accord: *Virginia Concrete Corp.*, 338 NLRB 1182, 1183 (2003).[14]

Notwithstanding that the Board had already rejected the same arguments advanced by UPMC in seeking dismissal of the single employer allegations in its first motion, the ALJ declined to follow the prior Board ruling because of the allegedly "changed circumstances" represented by UPMC's offer of a guarantee. [Supp. ALJD at 6]. He reasoned that:

> Clearly, the instant motion presents changed circumstances from those that UPMC relied on in filing its motion to dismiss with the Board. In the instant motion, UPMC seeks to dismiss the single employer allegation in the complaint on the basis that it is willing to serve as a guarantor and ensure that any remedy that the Board orders with respect to unfair labor practices committed by Presbyterian Shadyside are complied with. In filing its [earlier] motion with the Board, UPMC did not make such an argument and accordingly the Board did not to consider it.

Id.

[14] See also, *Club Cal-Neva*, 231 NLRB 22, 30 fn. 5 (1977)("Under [our] consistent policy it is the Administrative Law Judge's duty to apply established Board precedent which the Board or the Supreme Court has not reversed."); *Texaco, Inc.*, 290 N.L.R.B. 1182, 1189 (1988)("It remains the Trial Examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed.")

The ALJ erred because he equated UPMC's offer of a guarantee with the type of ***extraordinary*** change in the law or the discovery of new evidence which might warrant departure from the law of the case. In *Teamsters Local 75, supra*, the Board applied this heightened standard to situations where the law of the case is challenged:

> [R]econsideration or reversal of a prior decision . . . should not be taken absent '**extraordinary circumstances** such as where the initial decision was 'clearly erroneous and would work a **manifest injustice**.'

Id. at 80, citing *Christianson v. Colt Industries Operating Corp*., 486 U.S. 800, 817 (1988), (emphasis added).

The Board has interpreted such "extraordinary changed circumstances" to include intervening changes in law or newly discovered or previously unavailable evidence. *D.L. Baker, Inc. t/a Baker Elec*., 351 NLRB 515, 528 (2007) (finding that Board's earlier order was a mistaken interpretation of the Fourth's Circuit's decision and therefore clearly erroneous, adherence to which would lead to manifest injustice); *Penfield Plumbing & Heating, Inc*., 181 NLRB 914, 915 (1970) (the "absence of newly discovered or previously unavailable evidence or special circumstances [does] not permit litigation before a trial examiner in an unfair labor practice case of issues which were or could have been litigated in a prior related representation proceeding"); *Teamsters Local 75, supra* at 80 (no new evidence offered to demonstrate changed circumstances, nor did the General Counsel claim the prior order was erroneous or unjust). *See also* 2A Fed. Proc., L. Ed. § 3:793 ("The law-of-the-case doctrine should be applied as a matter of sound judicial practice unless one of three exceptional circumstances exists or compelling reasons render it inapplicable: (1) the evidence on a subsequent trial is substantially different, meaning new evidence is introduced after the first review; (2) controlling authority has since made a contrary decision of the law applicable to the issues; or (3) the decision in question is

clearly erroneous and would work a manifest injustice.")

Here, the posture of the single employer allegations did not change in the intervening 18 months between the Board's February 2014 decision and the recent ALJ's supplemental decision. Board law has not changed so as to render the prior order unfair or erroneous. No evidence has ever been presented on the single employer allegations and no record on the issue was ever opened.[15] UPMC's offer of a guarantee did not accompany any newly discovered evidence. Consequently, UPMC's offer simply did not rise to the requisite level of the type of ***extraordinary*** change to warrant the ALJ's departure from the Board's binding precedent.

Accordingly, the ALJ erred as a matter of law in disregarding the law of the case in dismissing the single employer allegations prior to hearing any pertinent evidence.

II. The ALJ Erred as a Matter of Law in Finding that UPMC's Offer to Guarantee Any Board-Ordered Remedy Against Presbyterian Is As Effective a Remedy as a Finding that It Is a Single Employer and Thus Subject to Joint and Several Liability. [Union Exceptions #1,# 2, #3, #4, #6, #8].

A. UPMC's Guarantee of Any Board-Ordered Remedies Against Presbyterian Is Not as Effective a Remedy as a Finding of Joint and Several Liability Because It Represents Only a Contingent Liability.

The ALJ was concerned that the single employer litigation could be extensive. Supp. ALJD at 5. He assumed that a single employer hearing following the resolution of the subpoena enforcement proceedings would take four to five days. *Id*. He further noted that, if he were to conclude that UPMC and Presbyterian were a single employer, he "would further find, consistent with Board law, that they are jointly and severally liable for the violations of the Act," subject to

[15] While some evidence ancillary to the merits was introduced which touched slightly on the single employer issue was introduced by Respondent during the merits trial [see notes 11 *supra* and 20 *infra*], it was not submitted for the purpose of proving or disproving the single employer allegations. Because the record on the single employer issue has never been opened, neither the General Counsel nor the Charging Party have had the opportunity to present evidence on this issue. When the ALJ opened the record for the limited purpose of accepting the parties' briefs and exhibits related to the PMTD, this "opening of the record" was really a misnomer: no opportunity was afforded to the parties to present evidence on the merits of the single employer allegations.

appeal to the Board, "thus engendering further litigation of the single employer issue." *Id*. He concluded that dismissing the single employer allegations and accepting UPMC's offer of a guarantee would avoid the "time-consuming and expensive course of litigating the single employer issue to its conclusion" while "avoiding the risk of further litigation," but providing an equally "effective remedy." *Id*. The ALJ reasoned:

> Accepting UPMC's offer to serve as a guarantor of any remedy that the Board may ultimately order against Presbyterian Shadyside and providing that UPMC do so pursuant to an order, in my view, **is as effective a remedy as I would provide if I were to find UPMC and Presbyterian Shadyside to be a single employer and thus jointly and severally liable for the unfair labor practices I have found were committed by Presbyterian Shadyside.**

Supp. ALJD at 5 (emphasis added).

The ALJ erred in accepting UPMC's offer to guarantee any Board-ordered remedies against Presbyterian, and finding the guarantee to be "as effective a remedy" as the joint and several liability which would follow a finding of single employer status. The ALJ's reasoning was erroneous because the "guarantee" represents a form of contingent liability, which is distinctly different from joint and several liability, which establishes *primary* liability at the outset for all parties, and serves important policies of the Act.

As defined by the Restatement (Third) of Torts, "[w]hen, under applicable law, some persons are jointly and severally liable to an injured person, the injured person may sue for and recover the full amount of recoverable damages from any jointly and severally liable person." Restatement (Third) of Torts: Apportionment Liab. § 10 (2000). Joint and several liability means that each liable party is individually responsible for the entire obligation at the outset. *See, In re Lee*, 508 B.R. 399, 404 (S.D. Ind. 2014)*; Lewis Bros. Bakeries v. Bittle*, No. 06-CV-4047-DRH, 2007 WL 4441223, at *2 (S.D. Ill. Dec. 17, 2007); LIABILITY, Black's Law Dictionary (10th

ed. 2014).

The Board routinely holds single employer entities to be jointly and severally liable for unfair labor practices. *See, e.g., Apex Elec. Servs., Inc.*, 356 N.L.R.B. No. 172, at *2 (2011) (companies found to be single employer held jointly and severally liable for remedying claimed unfair labor practices); *Summit Express, Inc.*, 350 N.L.R.B. 592, 596–97 (2007) (same); *Massey Energy Co.*, 358 NLRB No. 159 (2012), 2012 WL 4482797, at *14 (finding both entities, one of which was a holding company, to be "accountable" for ULPs); *Emsing's Supermarket, Inc.*, 284 N.L.R.B. 302 (1987) (finding joint and several liability even where one of the entities did not participate in the ULPs, "thus preserving for remedial recourse an entity to which liability may attach"); *Beverly Enters., Inc.*, 341 N.L.R.B. 296 (2004) (ALJ found an order imposing single employer liability appropriate, because it "would be a normal remedy.").[16]

On the other hand, a guarantee is, by its very nature, a contingent liability. "The classic example of a contingent debt is a guaranty because the guarantor has no liability unless and until the principal defaults." *In re Pennypacker*, 115 B.R. 504, 507 (Bankr. E.D. Pa. 1990). *See also In re SNTL Corp.*, 380 B.R. 204, 216 n.13 (B.A.P. 9th Cir. 2007) *aff'd*, 571 F.3d 826 (9th Cir. 2009) ("[I]n the case of the classic contingent liability of a guarantor of a promissory note executed by a third party, both the creditor and guarantor knew that there would be liability only if the principal defaulted. No obligation arises until such default."); Restatement (Third) of Suretyship & Guaranty § 1(2) (1996). If the required contingency—default by the primary obligor—does not occur, the guarantor's obligation is never triggered. *In re SNTL Corp.*, 380 B.R. at 216 n.13; *In re Martz*, 293 B.R. 409, 411 (Bankr. N.D. Ohio 2002 (a guaranty is the "quintessential" type of contingent debt.)

[16] Even in cases involving Board-approved settlements, the Board has held that the release of one jointly-and-severally liable tortfeasor does not release the other joint tortfeasor unless that is the intention of the parties. *Urban Labs., Inc.*, 305 NLRB 987, 987-88 (1991).

Accordingly, UPMC's guarantee of any Board-ordered remedies against Presbyterian is not, by definition, as "effective a remedy" as joint and several liability because it is only contingent upon Presbyterian's default, whereas, if found to be a single employer, it would be primarily liable for the unlawful conduct "from the outset." Such a distinction is crucial for purposes of future injunctive relief. Contingent liability would not provide the full remedy the General Counsel is entitled to seek against UPMC, including notice posting, cease and desist provisions, rescission of unlawful policies, expungement of records, and the ability to prospectively enforce such cease and desist orders through contempt proceedings.

Moreover, contingent liability will allow UPMC to litigate whether there was in fact a default by Presbyterian, thereby prolonging the implementation and effectuation of the "guarantee." Finally, as shown below, imposing contingent liability upon UPMC disserves the policies of the Act.

B. Joint and Several Liability Serves Important Policies of the Act.

1. Joint and Several Liability Ensures that the Board's Order is Binding on All Entities Responsible for Labor Relations, Including for Purposes of Future Injunctive Relief.

Joint and several liability serves important policy purposes of the Act. "The objective of the single employer doctrine is to ensure that the Board's decision and order are binding on the entity or entities responsible for controlling labor relations." *Oaktree Capital Mgmt., L.P. v. NLRB*, 452 Fed. Appx. 433, 438 (5th Cir. 2011). If two employers are found to be a single employer, they are joint and severally liable for remedying the unfair labor practices and ordered to cease and desist from their unlawful conduct and take certain affirmative action designed to effectuate the policies of the Act. *Wheeling Brake Block Mfg. Co.*, 352 NLRB 489, 508 (2008).

Indeed, the Board has imposed single employer liability even in cases where there was no

suggestion that one entity would not be able to provide complete relief. For example, in *Lederach Elec.*, 362 N.L.R.B. No. 14 (Feb. 3, 2015), the Board reversed the ALJ's dismissal of a compliance specification stating that nominal employer Lederach constituted a single employer along with affiliate MRP. The ALJ reasoned that he saw no "public policy rationale for finding MRP and Lederach to be a single employer," as there was no evidence that Lederach had "depleted its assets by transferring them to MRP," but the Board overruled the ALJ's decision and necessarily rejected its premise by finding the existence of a single-employer relationship. The *Lederach* decision makes clear that the Board's policy is to preserve the single employer remedy for securing appropriate relief against all affiliated and potentially responsible entities.

As these cases demonstrate, preserving the Board's ability to remedy extant ULPs against *all* responsible entities in one proceeding serves an important purpose of the Act. For this reason, in *UPMC I*, ALJ Goldman held that retaining UPMC as a party "serves not only to empower the Board to issue remedial relief affecting UPMC, but permits UPMC to protect its interests."[17] The Board approved the ALJ's rationale and affirmed. 362 NLRB No. 191, slip op. at 1, fn. 2.[18]

Here, as in *UPMC I*, UPMC is a necessary party for complete relief. By its very corporate structure, UPMC has comprehensive and ultimate authority over Presbyterian. It admitted in a stipulation in *UPMC I* that that it delegated "most" of its "policy-making functions" to Presbyterian; this demonstrates that UPMC can rescind such a delegation at any time.[19] Indeed, the Board recently recognized in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186, slip op. at 14 (August 27, 2015) that actual control of one entity over another need not be

[17] *UPMC I*, April 19, 2013 Decision, JD-28-13 (slip opinion at 23)(emphasis added).

[18] The type of injunctive relief at issue in *UPMC I* involved the expungement of corporate-wide policies.

[19] See the stipulation attached to Charging Party's Opposition to Partial Motion to Dismiss, Exhibit A at ¶5.

exercised "directly and immediately" in order to be determinative of a joint employer relationship; reservation of the right to control is equivalent to control.

Here, there was actually some evidence of immediate and exercised control by UPMC. For example, at trial in *UPMC II*, Presbyterian itself introduced evidence of UPMC's direct participation in one of terminations found to be unlawful, along with other evidence of its control over labor relations.[20]

UPMC is thus a necessary party to obtain full corporate accountability for Presbyterian's unlawful conduct and prevention of future recidivism. If it were found to be a single employer, jointly and severally liable for Presbyterian's misconduct, it would be subject to injunctive relief, and other affirmative aspects of any Board-ordered remedies. But as a mere contingent guarantor, UPMC will never be held responsible for, or be ordered to cease and desist from, Presbyterian's unlawful conduct, thereby defeating one of the central purposes of joint and several liability. To permit UPMC to be liable only on a contingent basis would needlessly impair the Board's ability to efficiently achieve complete injunctive and other remedial relief against an entity which could admittedly withdraw its delegation of authority from Presbyterian at any time.

Moreover, the imposition of contingent liability portends litigation on whether UPMC will actually be required to "guarantee" any Board-ordered remedies upon a default by Presbyterian. For example, if the General Counsel believes there has been a default and UPMC disagrees, this would occasion further complicated and prolonged litigation as to the scope of

[20] For example, PHU/SHY Exhibits 299, 300 and 301 demonstrate that Robert DeMichiei, UPMC's Chief Financial Officer, heard and denied the appeal of the grievance of discriminatee Al Turner. PUH/SHY Exhibit 411 represents Respondent's effort to refute the discriminatory Performance Improvement Plan and discharge of Jim Staus by introducing comparator evidence from another UPMC subsidiary, Hamot Medical Center. The ALJ noted the irony in UPMC's denial of a single employer relationship while relying on evidence from another subsidiary to justify the treatment of Jim Staus. See 11/14/14 ALJD at110.

UPMC's obligations under the "guarantee." Such a result would not further the policies of the Act.

In light of these facts, retaining UPMC as a Respondent subject to full joint and several liability after hearing is the only way to protect all parties' interests and ensure that any final Board order results in meaningful, comprehensive and fully enforceable relief. The ALJ erred in imposing such limited contingent liability upon UPMC.

2. Joint and Several Liability Serves the Policies of the Act by Virtue of its Deterrent Effect on Future ULPs.

In light of the protracted three-year history of the ULPs charged against Respondents, deterrence of future unlawful conduct by UPMC and its various subsidiaries is a critical consideration. In *Beverly Health and Rehabilitation Services*, 335 N.L.R.B. 635 (2001), the Board emphasized the importance of the deterrent effect of single employer liability and upheld an ALJ's finding of single employer liability and imposition of corporate-wide remedies against the parent company "where a single-employer respondent has demonstrated a proclivity for violating the Act at a significant number of facilities." *Id.* at 642. The Board reasoned:

> First, as demonstrated above, where we determine that a respondent is a single employer with a proclivity for violating the Act, we have necessarily determined that the unfair labor practices found have generally emanated from a central source. The particular location where employees engaged in Section 7 activity consequently had little or no bearing on the respondent's decision to respond in an unlawful manner; the respondent would presumably have committed the same or similar violations regardless of where the protected activity occurred. In short, although the respondent's propensity to violate the Act was manifested primarily where employees happened to exercise their Section 7 rights, the propensity exists corporatewide. ***This militates in favor of issuing a single, comprehensive remedial order and notice which will have a deterrent effect at all the respondent's facilities***.

Id. at 642 (emphasis added).

Similarly, the Board's decision in *Three Sisters Sportswear*, 312 NLRB 853 (1993) supports the necessity of proceeding with trial of the single-employer allegations to avoid subsequent litigation over remedial recourse *and* to deter future violations. The ALJ incorrectly rejected the applicability of *Three Sisters* to the instant case. Supp. ALJD at 7-8.[21] Although *Three Sisters* is indeed factually "quite different" from the circumstances here, the Board upheld the ALJ's decision that deferring a decision on the single employer issue until the compliance phase would have been improper.[22] The ALJ reasoned that "it is essential for a determination to be made on the record so that proper legal responsibility for Respondents' actions can be enforced, with the possibility of contempt against all of the possible violators, in the event of future violations" to avoid "duplication of the litigation." [*Id.* at 857]. The Board's decision in *Three Sisters* expressed a policy favoring immediate enforcement against all responsible parties and deterrence of future violations, contrary to the contingent liability approach adopted by the ALJ here.

Given the now-obvious ineffectuality of the *UPMC I* settlement, there is no reason to believe that UPMC's contingent "guarantee" of Presbyterian's compliance with any Board-

[21] The ALJ incorrectly distinguished *Three Sisters* on the basis that it was "quite different" from the circumstances here because "evidence regarding the complicated relationship between the various companies had already been presented." Supp. ALJD at 8. The ALJ's logic was faulty, since his decision deprived the General Counsel from presenting evidence in support of the single employer relationship, thus creating the very distinction he cited as controlling.

[22] The procedural history of the *Three Sisters* case is complex. In prior litigation involving some of the parties, the ALJ and the Board found certain of the respondents in this case to have committed ULPs, and the Region issued a backpay specification alleging that those respondents and others constituted a single employer. In the subsequent ULP case, all the same respondents in the prior backpay specification were again alleged to be a single employer. The ALJ raised the issue of whether it was necessary for him to rule on the single-employer allegation given the pendency of the backpay specification in the prior case. In the prior backpay-specification proceeding, the ALJ had deferred litigation of the single-employer issue until the record was complete in the subsequent ULP case, at which time he would decide which portions of the ULP record would be incorporated into the record of the backpay-specification proceeding. The backpay specification was settled when all the respondents stipulated that they would be jointly and severally liable for the remedy, while continuing to deny that they constituted a single employer. The ALJ then had to decide whether to rule on the single-employer allegation in the subsequent ULP case. The respondents contended that there was no need to do so unless it became necessary in another compliance proceeding. This argument was rejected by the ALJ and the Board.

ordered remedies would serve to deter future unlawful conduct by its subsidiaries. Presbyterian is clearly a recidivist labor law violator. Under these circumstances, letting UPMC evade a finding of joint and several liability in exchange for the limited liability of a contingent "guarantee" fails to serve the purposes of the Act in deterring future misconduct and protecting workers.

C. The ALJ Acted Outside the Scope of His Authority When He Accepted the Remedy of a Guarantee as a Substitute for Further Litigation.

The ALJ held that "it would not effectuate the policies of the Act to further litigate the issue and make a determination regarding whether UPMC and Presbyterian constitute a single employer." Supp. ALJD at 3-4; 7, 8-9. He reasoned that UPMC's guarantee was an "appropriate" remedy because there was no allegation that it independently committed any ULPs and any UPMC liability "would be solely dependent on a finding that it constitutes a single employer with Presbyterian." *Id*. at 4.

As argued in the preceding sections, the ALJ erroneously disregarded the policy bases for litigating the existence of a single employer relationship and imposing joint and several liability. He also acted outside the scope of his authority in accepting UPMC's guarantee as a substitute for litigating the single employer issue. In effect, he improperly usurped the role of the General Counsel in accepting UPMC's settlement proposal of the guarantee to resolve the litigation. Notably, the General Counsel and Charging Party *rejected* this proposal in May 2015, prior to the judge's solicitation of UPMC's PMTD. [23]

[23] The law is well-settled that the General Counsel possesses unreviewable prosecutorial discretion to file, withdraw or dismiss allegations in a complaint prior to the commencement of hearing. *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124 (1987) (consideration and approval or rejection of a pretrial settlement are the sole province of the General Counsel, subject to the review procedures provided to parties adversely affected by the rulings).

The ALJ's reasoning demonstrates that he approached the issue of the guarantee as if he were weighing the merits of a settlement between consenting parties. It was not within the ALJ's province to decide whether the guarantee provided a "great benefit" and an "additional safeguard" for employees "without the risk that further litigation may result in a finding that UPMC and Presbyterian are not, in fact, a single employer." *Id*. at 5. The General Counsel and the Union were each represented by counsel whose roles were to consider such factors; nonetheless, they rejected UPMC's settlement proposal.

There is no precedent in the body of law governing joint and several liability for the ALJ's acceptance of UPMC's guarantee as a substitute for the litigation of the single employer allegations, especially over the General Counsel's and Union's objections. The ALJ acted far outside the scope of his authority in effectively implementing a settlement which had been rejected by the other parties. His decision improperly overrode the General Counsel's exercise of prosecutorial discretion.[24]

Finally, the ALJ's determination that it did not effectuate the purposes of the Act to litigate the single employer issue was based on a misapprehension of Board precedent. He relied on several cases in which he asserted that the Board recognized that it did not effectuate the policies of the Act to litigate and issue a remedial order, in which "the

[24] See Charging Party's Exception #6. The Union joins the General Counsel's argument on this and other related points. After a trial has opened but before evidence has been introduced, the General Counsel possesses "unreviewable discretion" to dismiss the complaint. The ALJ may not contradict a General Counsel's decision as to how to proceed before he has introduced evidence related to the charges. *See Sheet Metal Workers, Local 28 (American Elgen)*, 306 N.L.R.B. 981, 981-82 (1992) (reversing the judge, the Board held that, even if the trial has opened, the General Counsel retains sole, unreviewable, authority to withdraw the complaint if no evidence has been introduced and no contention has been made that a legal issue was ripe for adjudication on the parties' pleadings alone). Here, no evidence has been taken on the single employer issue. Accordingly, pretrial dismissal of the single employer allegations over the opposition of the General Counsel was reversible error because it violated the General Counsel's sole authority over the allegations of the complaint prior to trial.

allegedly unlawful conduct . . . had been substantially remedied by later conduct." Supp. ALJD at 4. The cases cited by the ALJ at p. 4 are factually distinguishable.

For example, *Fabrica De Muebles*, 107 N.L.R.B. 905 (1954) is inapposite. There, the Board reversed a bargaining order when it became moot after a Trial Examiner held a hearing on the merits, issued an interim decision and bargaining order, and the parties subsequently bargained and reached a new contract, rendering the interim order unnecessary. Consequently, dismissal occurred *after* a full hearing and *after* the respondent actually complied with the order, circumstances which are simply not present here where there has been no hearing and no compliance with the November 14, 2014 ALJD.[25] Three other cases relied upon by the ALJ involved "*de minimis*" violations which did not amount to violations of the Act and did not warrant further litigation or remedy.[26]

Accordingly, none of the circumstances of the cases relied upon by the ALJ are remotely similar to the circumstances present here and do not support his dismissal of the single employer allegations. [27]

III. The ALJ Erred As a Matter of Law in Concluding that He Could Rule on UPMC's Partial Motion to Dismiss in the Absence of Any Pertinent Record Evidence. [Exception #7].

[25] See also, *Kentile Inc.*, 145 NLRB 135 (1963)(complaint involving employer's refusal to bargain over return of strikers was dismissed by the Board after hearing by trial examiner, where the strikers returned to work and the union was decertified.)

[26] *Wichita Eagle & Beacon Publishing Co.,* 206 NLRB 55 (1973)(conduct was "so minimal and isolated" that it did "not furnish sufficient basis for either a finding of a violation of the Act or issuance of a remedial order" and "should not have been processed" in the first place); *Square D Co*. 204 NLRB 154 (1973)(inappropriate remarks "on a single, isolated occasion" did not rise to the level of an 8(a)(1) violation and did not justify a finding of a violation or a remedy); *American Federation of Musicians, Local 76 (Jimmy Wakely Show),* 202 NLRB 620 (1973)(conduct "so minimal" that the entire situation is "of little significance" and had "such obviously limited impact and significance" that no finding of a violation of the Act was warranted.)

[27] Similarly, *Bellinger Shipyards*, 227 NLRB 620 (1976) is inapposite because there, the unlawful conduct had been remedied before the complaint was issued.

The ALJ ruled that "since the record has opened in this case and the single employer issue remains pending before me, I have jurisdiction to rule on the partial motion to dismiss. Sections 102.35(a)(8) and 102.24(a) of the Board's Rules and Regulations." Supp. ALJD at 2, fn. 3. The ALJ's ruling on this point was contrary to §102.35(a) which requires the ALJ to "inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint." [28]

While the record on the merits of the complaint had opened, no evidence had ever been presented on the single employer allegations and there was no basis to dismiss the single employer allegations on the pleadings alone.[29] The single employer allegations raise complex and disputed issues of fact which should not have been resolved on the PMTD or on the basis of the promise of a guarantee. The ALJ's decision deprived the General Counsel of his fundamental right to hearing on the allegations of the complaint.

CONCLUSION

Based on the foregoing arguments and authorities, the Union respectfully requests that Board not adopt the findings and recommended order contained in the Supplemental ALJD. Instead, the Board should grant the Union's exceptions, reverse the ALJ's Supplemental Decision and remand the case to the ALJ for trial, at the appropriate time, on the single employer allegations.

[28] The Board has consistently applied §102.35(a)(8) in situations where pretrial dismissal would be appropriate based on the pleadings alone, such as in the case of motions for default judgment or motions for summary judgment. *See, e.g., Calyer Architectural Woodworking Corp*., 338 N.L.R.B. 315, 317 (2002) (affirming ALJ's award of motion for summary judgment).

[29] While some evidence pertinent to the single employer issue was introduced by Respondent during the merits trial, [see note 20 *supra*], it was not submitted for this purpose. Also see note 15 *supra*.

Dated: September 18, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Charging Party's Limited Exceptions in the above captioned case has been served by email on the following persons on this 18th day of September 2015:

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